APPEAL NO. 93137

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp. 1993). On January 14, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that respondent (claimant) was mentally injured by a press conference that was not a legitimate personnel action. Appellant (city) asserts that the investigation of the claimant is a legitimate personnel action, and this fact communicated to claimant as a result of a press conference does not change that legitimacy.

DECISION

Finding that the investigation, which was the subject matter communicated through a press conference, was a legitimate personnel action, we reverse and render.

Claimant is a police sergeant, having been promoted to that rank in December 1990. She has been assigned in the past to the internal affairs division of the police, which investigates allegations of police impropriety. The testimony of Lt. W (Lieutenant) who is now assigned to internal affairs, indicates that investigations by internal affairs are conducted to "maintain discipline" and are a function of management of the organization; they are not criminal investigations. Claimant acknowledged that she had been investigated several times in the past by internal affairs and these investigations did not cause her to have post-traumatic stress syndrome. Claimant considered herself to be the "scapegoat" in regard to events evolving from an allegation of police brutality on (date of injury), but both she and her counsel attacked the manner in which the investigation was begun, not the right of the police department to investigate its officers.

On (date of injury), claimant was the sergeant assigned to the 10:00 p.m. to 6:00 a.m. shift when she received a call of an arrest in which a suspect was subdued and taken to a hospital. She went to the scene, assessed it, and obtained statements from the officers involved, plus she talked to a civilian witness. She prepared an incident report but did not initiate an investigation of the arrest. She did prepare a memorandum for her Captain and states that she informed the shift that took over for hers after staying late at the end of her shift. She went home. She further testified that she received one call from her Captain asking if she had investigated the incident; she said he mentioned that the suspect had been kicked a number of times. (She said she knew the suspect had been kicked but did not know how many times.) She also said that the Captain asked for an incident report, but she testified that she had provided that at the time and never heard of preparing two incident reports. Later she was called, while asleep on (date of injury), by a news reporter asking for her reaction to the investigation to be conducted concerning whether she was derelict in her duty, as revealed at a press conference just conducted. Claimant testified that this news made her feel sick, and she did seek medical care at the end of the month but worked between May 14th and the time she started to see Dr. G (Dr. G) who took her off work. (The medical records of Dr. G indicate she first saw claimant on June 1, 1992.) She testified that it was unethical for the investigation of her activity to be announced at a news

conference without telling her.

Claimant's physician, Dr. G, testified that she has a program for treating police officers for stress. She said claimant's depression was caused by job related stress. She later testified that the telephone call from the news media asking about the investigation of claimant mentioned in a press conference caused both the depression and a post-traumatic stress disorder. On cross-examination, Dr. G said that the depression was not caused by the media phone call, but that the post-traumatic stress disorder was. Later on cross-examination, she said that she had made her final diagnosis without knowing about the media call. She then likened her treatment process to peeling away the leaves of an artichoke to get to the core. Except for her statement about how she made her "final" diagnosis, Dr. G was consistent in stating that the post-traumatic stress disorder was caused by the one phone call from the media described previously; her testimony was contradictory, however, as to the cause of the depression and was remarkable for certain comments, such as:

> major depression can affect an individual's immune system and I would say as a result of the stress that she has been under and affecting her immune system (claimant) developed breast cancer recently and underwent a mastectomy . . . about two weeks ago.

Dr. R (Dr. R) saw claimant for a period of time in September 1992 and testified that he concurred in Dr. G's assessment of post-traumatic stress disorder. He, however, cannot say that the post-traumatic stress disorder was the result of the phone call from the media. He was not aware that the claimant had been treated prior to May 14th for anxiety attacks and said it might affect his opinion as to post-traumatic stress disorder.

Claimant's medical records, which she submitted in evidence, reveal that in June 1992 she related a history of stomach problems from stress at work, anxiety attacks, and having been "traumatized at work secondary to sexual harassment." She referred to a hearing scheduled for sexual harassment by a supervisor that has "been ongoing for many years."

The deputy chief of police, (JD), testified that on the morning of (date of injury), the citizens of the "community", in which the suspect was arrested and taken to the hospital, called a press conference at which the press received inaccurate information. A decision was made that the police needed to "set the record straight." He said that allegations and names of people who would be investigated were released. He added that the information released was releasable through the Open Records Act. He said that it was not uncommon for a policeman to be investigated and not uncommon for the press to have the names of those being investigated. He acknowledged that the police press conference did quiet the neighborhood where the arrest had occurred. He maintained that the investigation of the

claimant is legitimate. In that regard, JD had earlier testified that with one officer's statement saying he kicked the suspect three times and another's statement saying the suspect was kicked in the stomach, the supervisor had a duty to initiate an investigation.

Captain T (Captain) said that he called claimant at home after receiving the paperwork she left. He said that she should have called internal affairs or him about the incident. He said that what he asked her for was a statement, not another incident report. The lieutenant, (mentioned at the outset of this decision), in addition to describing the reason for internal affairs investigations, said that he would not be surprised if there were other police press conferences, but they were unusual.

Article 8308-4.02 of the 1989 Act states:

(a)It is the express intent of the legislature that nothing in this Act shall be construed to limit or expand recovery in cases of mental trauma injuries.

(b)A mental or emotional injury that arises principally from a legitimate personnel action, including a transfer, promotion, demotion, or termination is not a compensable injury for the purposes of this Act.

The (a) part of this article allows the Appeals Panel to look to cases of mental trauma decided under the prior law. Some of these cases, such as City of Austin v. Johnson, 525 S.W.2d 220 (Tex. Civ. App.-Beaumont 1975, writ ref'd n.r.e.) and Marsh v. Travelers Indem. Co. of R.I., 788 S.W.2d 720 (Tex. App.-El Paso 1990, writ denied) have said that worry and anxiety over job loss, failure to be promoted, etc., are not sustained in the course of employment because they are not connected with the employer's business. To a certain extent, Article 8308-4.02(b) codifies the rationale in this line of cases by excepting "legitimate personnel actions." A distinction between the prior law treatment of mental trauma and the 1989 Act with Article 4.02(b) in place is posited by A Guide to Texas Workers' Comp Reform, Vol 1, Sec 4.02(b), page 4-38, note 118, Montford, Barber, Duncan, which says: "For reference to a case where mental trauma resulting from personnel actions was held compensable which should no longer be compensable under Sec. 4.02(b), *see* Director, State Employees Workers' Compensation Div. v. Camarata, 768 S.W.2d 427 (Tex. App.-El Paso 1989, no writ)." (In Camarata an employee suffered from severe anxiety and other symptoms after he saw a memo about his work performance.) A more recent case, cited on appeal by appellant, is Duncan v. Employers Cas. Co., 823 S.W.2d 722 (Tex. App.-El Paso 1992, no writ history). This case reviewed a summary judgment granted by the trial court to the carrier after Duncan brought suit for mental trauma from a transfer and reprimand. The appellate court correctly recited that it must look at evidence on behalf of the claimant as true when reviewing a summary judgment. It recited that Duncan stated it was not the transfer, but "it was the manner in which the transfer was done" that bothered Duncan. The appellate court still affirmed the summary judgment saying that such injury is

not connected with the furtherance of the employers' business.

The Appeals Panel has reviewed a number of mental trauma cases. Some of those reviewed involved a question of whether a personnel action was the principle cause of the mental trauma. In Texas Workers' Compensation Commission Appeal No. 92189, decided June 25, 1992, a hearing officer found that the personnel action which resulted in mental trauma was not legitimate because a superior to the supervisor conducting the personnel action stated that the way in which it was done was against the employers' policy. We affirmed that decision. Thereafter, in Texas Workers' Compensation Commission Appeal No 92710, decided February 13, 1993, in which the Appeals Panel upheld a hearing officer who found that a personnel action was legitimate, the Duncan case was cited; Judge Kelley then stated, "[i]t could be similarly argued that even if crude language is used during a reprimand, such language would not inexorably remove the reprimand from the ambit of 4.02(b)."

The Appeals Panel has not imposed any condition upon a personnel action, except that it be "legitimate", in order for such action to be excluded from causing a compensable mental trauma. *See*, for instance, Texas Workers' Compensation Commission Appeal No. 92266, decided August 3, 1992, and Texas Workers' Compensation Commission Appeal No. 93022, decided February 24, 1993.

In the case before us claimant asserts that the disclosure of her name at a press conference was unethical and was not a legitimate personnel action. There was no showing how or why such release was unethical. Unlike Appeal No. 92189, *supra*, in which there was evidence that the method of accomplishing the personnel action was contrary to employer policy, no evidence from within or without the police department indicated that such a release was not allowed. (*See* Vernon's Ann. Civ. St. art. 6252-17a and Attorney General Opinions interpreting it, including Op. Atty. Gen. 1982, No. ORD-315, and Op. Atty. Gen. 1983, No. ORD-397, which do not indicate that claimant's name would not be releasable.)

We do not disagree with claimant in stating that an employer should provide the derogatory news to the person involved before making it available to others. We do not hold in this opinion that any press conference release will be considered to be either a legitimate personnel action or a part of such a legitimate action. Without evidence that the manner of accomplishing the action makes it other than legitimate, we will not impose our concept of an appropriate management gesture as an added condition to personnel actions described in the article in question. We observe that there can be valid reasons not to first tell an individual of a personnel action or inquiry. In the case on appeal no one alleged that the police release did not occur as a response to an earlier press conference held by others.

Concluding that the claimant did not show that the communication of a personnel action in this case was contrary to law, employer's policies, or any other requirement that would render illegitimate the underlying personnel action, the provisions of Article 8308-4.02(b) apply and claimant's mental injury is not compensable. (We note that the hearing officer stresses that the claim before her was brought only on the depression injury, not the post-traumatic stress disorder injury. Evidence on both was freely provided by the claimant and both were litigated. Since our ruling is based on the episode in question as being part of a legitimate personnel action, the particular diagnosis did not control this decision.) The decision is reversed and rendered.

Joe Sebesta
Appeals Judge

CONCUR:

Philip F. O'Neill
Appeals Judge

Thomas A. Knapp
Appeals Judge